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No. 88-1951

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FRANCES L. DALM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. It is black letter law that the United States may not be sued except as it expressly consents to suit. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). An action that does not comply with the conditions that Congress has attached to its waiver of sovereign immunity may not be maintained. And it is equally clear that a statute of limitations "constitutes a condition on the waiver of sovereign immunity" and, as such, "define[s] the extent of the court's jurisdiction" over a claim. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); see also *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Therefore, failure to satisfy the limitations period established by Congress is

an absolute bar to a lawsuit. This case is a suit by a taxpayer to recover money from the government on the ground that she overpaid her taxes. It is undisputed that this action was not filed within the limitations period established by Congress for such tax refund actions. Accordingly, under fundamental principles of jurisdiction and sovereign immunity, the suit may not be maintained. Neither the court of appeals nor respondent has explained why this case is not governed by these principles.

Respondent argues, and the court of appeals held, that this lawsuit is permitted under the doctrine of equitable recoupment recognized by this Court in *Bull* v. *United States,* 295 U.S. 247 (1935). As we explained in our petition (at 6-8), however, the Court in *Bull* made clear that the doctrine is consistent with principles of sovereign immunity and with the statutory limits on jurisdiction in that it does not permit an independent suit that is barred by the statute of limitations. Rather, the doctrine of equitable recoupment simply allows a party to raise a recoupment claim as an offset in an action regarding a related tax controversy that has been brought in accordance with the jurisdictional prerequisites established by Congress—specifically, "so long as the main action itself is timely" (295 U.S. at 262). Because respondent is not seeking to recoup her gift tax payments as an offset against another tax liability being litigated in a timely action, *Bull* is not applicable to this case.

Respondent completely ignores this crucial limitation on equitable recoupment and the related discussion in the petition. Instead, respondent simply maintains that she is free to bring this lawsuit to recover money from the United States, despite the conceded absence of congressional consent, because, "as in *Bull,* there was double taxation resulting from inconsistent treatment of the same money and it was too late to file a claim for refund" (Br.

in Opp. 3). Respondent proceeds to state that "[r]etention of the money paid as a gift tax in [the instant case] is against morality and conscience just as retaining the Estate tax in *Bull*" (*ibid.*). The very portion of *Bull* paraphrased by respondent demonstrates the fundamental error of her rudimentary effort to equate the two cases. As we noted in our petition (at 7), the Court in *Bull* made clear that, even though retention of the estate tax overpayment could be viewed as "against morality and conscience" (295 U.S. at 260), the taxpayer there could not seek a refund of that overpayment once the limitations period had expired, and he would have had no judicial redress but for the opportunity to raise the claim for recoupment in the timely filed income tax refund suit. Respondent here, having failed to file a timely gift tax refund suit or to raise a recoupment claim in a timely suit for refund of the income tax (see pages 4-5, *infra*), no longer has any permissible avenue for redress in court. As *Bull* and its progeny make clear, she is not authorized to sue the United States in defiance of the conditions established by Congress.

2. The thrust of respondent's argument is that she must be allowed to sue for a refund of the gift tax that she paid for 1976 because it would be inequitable to permit the IRS to retain those funds (see Br. in Opp. 4-6). As this Court noted in *Rothensies* v. *Electric Storage Battery Co.,* 329 U.S. 296, 302 (1946), however, the inevitable price of enforcing statutes of limitations is the possibility of inequities in individual cases. Respondent's position is no different from that of any other taxpayer who has overpaid his taxes, but whose refund claim is barred by the statute of limitations. If the unfairness of that predicament is sufficient reason to permit an untimely refund suit, statutes of limitations are meaningless. They would bar only unmeritorious claims—which, of course, can be distinguished

from those that are meritorious only by litigating the merits in each case.

Respondent also argues (Br. in Opp. 5) that her lawsuit should be allowed to proceed because the government acted "arbitrar[ily]" and "outrageous[ly]" in failing to refund the gift tax when it proceeded against respondent for the income tax due. These accusations are unfounded. Under Section 6402(a) of the Internal Revenue Code, the IRS is authorized to make refunds or credits in respect of overpayments of tax "within the applicable period of limitations," and therefore it lacked authority to refund the gift tax paid by respondent here.[1] In any event, even if there were grounds for criticizing the IRS's conduct in this case, that would not establish a basis for jurisdiction of an action against the United States that fails to satisfy the applicable statute of limitations.

Respondent also notes (Br. in Opp. 9) that the income tax deficiencies were not asserted until the time to seek

[1] The IRS could have allowed a credit for the gift tax payment if respondent had made a claim for application of that payment against the income tax deficiency. See Rev. Rul. 71-56, 1971-1 C.B. 404. Respondent made no such claim, and instead elected to contest the income tax deficiency in the Tax Court. It is not clear whether she in any event received a credit for the gift tax payment in the course of the Tax Court proceedings. The government did not collect the full amount of the asserted income tax deficiency. Instead, the income tax litigation was settled for a lower amount, and the total amount of tax collected by the government (both income and gift tax) was less than the amount of the income tax deficiency. The district court observed that the income tax settlement appeared to be designed to credit respondent for the gift tax that she paid (Pet. App. 20a). While the court of appeals held that there was an insufficient factual basis for treating the income tax settlement as providing full credit for the gift tax payment (*id.* at 14a-16a), there is similarly no basis for concluding on this record that the settlement did not provide such a credit. Thus, respondent's assumption that she has been subjected to double taxation (see Br. in Opp. 5) is not necessarily correct.

a gift tax refund had expired, and argues that it therefore is not realistic or fair to expect her to have filed a timely gift tax refund action. The practical problem posed by such a situation, however, is alleviated by the equitable recoupment doctrine discussed in *Bull* and by the mitigation provisions enacted by Congress in 1938 (see 26 U.S.C. 1311-1314; Pet. 10), which are an express exception to the generally applicable statute of limitations. As respondent recognizes (Br. in Opp. 12), however, Congress did not choose to permit mitigation in the circumstances presented here. And, as we noted in our petition (at 14), respondent did not take the steps necessary to seek to recoup her gift tax payment under *Bull* by claiming it as an offset in a timely filed action for an income tax refund. The course of action chosen by respondent—filing an independent action against the United States that is clearly barred by the statute of limitations—is not permissible. The court of appeals has no authority to create a new method for respondent to recover an overpayment of tax—outside the established framework of a timely refund suit, an equitable recoupment claim in a timely filed suit, or a suit allowed by the mitigation provisions. As this Court has stated (*Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. at 303), "[i]f there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them."

3. In our petition, we explained (at 11-16) that the decision below squarely conflicts with decisions of the Seventh Circuit and the Court of Claims that rejected efforts to invoke equitable recoupment as a basis for an independent time-barred suit against the United States to recover an alleged overpayment of tax. We further explained (at 17-19) why resolution of this conflict is necessary to eliminate uncertainty for taxpayers and practi-

tioners in managing their tax litigation. Respondent does not effectively rebut these points.

The rationale for the Seventh Circuit's decision in *O'Brien* v. *United States,* 766 F.2d 1038 (1985), is clearly stated in the opinion and is flatly inconsistent with the decision below: "[T]he doctrine [of equitable recoupment] cannot be used 'as an independent ground for reopening years now closed by the statute of limitations,' *Evans Trust v. United States,* 462 F.2d 521, 526, 199 Ct. Cl. 98 (1972), and requires the timeliness of the underlying action against which a party seeks to employ recoupment" (766 F.2d at 1049). In this case, respondent is not seeking to recoup her gift tax as an offset against another tax liability; the instant suit against the United States concerns only the time-barred gift tax issue. Thus, it is clear that the Seventh Circuit (and the Federal Circuit (see Pet. 11, 14)) would not allow the suit.[2]

Nor is there substance to respondent's assertion (Br. in Opp. 7-8) that her suit is not an "independent suit" within the meaning of *O'Brien* because the government filed a timely notice of income tax deficiency in this case. There is no reason to believe that the Seventh Circuit used the word "independent" in a manner completely divorced from the

[2] Respondent's assertion (Br. in Opp. 8) that the Seventh Circuit has abandoned *O'Brien,* or that the decision can be reconciled with the decision below, because the Seventh Circuit cited *Kolom* v. *United States,* 791 F.2d 762 (9th Cir. 1986), in *First Chicago Corp.* v. *Commissioner,* 842 F.2d 180, 182 (7th Cir. 1988), is plainly without merit. The referenced citation merely notes *Kolom* as a case where the taxpayer was permitted to invoke equitable recoupment; the court in *First Chicago,* which did not involve an equitable recoupment issue, did not consider the correctness of *Kolom* and certainly did not approve the decision. Respondent's further assertion that the government relied upon—or even cited—*Kolom* in its brief in *First Chicago* is simply incorrect, and the government has never suggested that *Kolom* was correctly decided.

ordinary meaning of the word. Moreover, as we explained in our petition (at 15), respondent's related assertion that the result in *O'Brien* turned on the absence of a deficiency notice in that case is refuted by common sense, by this Court's decision in *Stone* v. *White,* 301 U.S. 532 (1937), and by the opinion in *O'Brien* itself, which notes that the taxpayer there could have raised a recoupment claim in a timely filed estate tax refund action.[3] Rather, O'Brien's claim failed because he did not raise it as an offset in a timely-filed action, but instead, like respondent, "assert[ed] recoupment affirmatively" (766 F.2d at 1049) by filing an independent action against the United States that did not meet the conditions imposed by Congress. Accordingly, there is a square conflict in the circuits that requires resolution by this Court.[4]

[3] And, as we also explained in our petition (at 16 n.9), respondent's assertion that *O'Brien* rested either on a failure to meet the "single transaction" requirement or on a lack of identity of interest between O'Brien and the estate cannot be maintained in the face of the Seventh Circuit's explicit statements that it did not find O'Brien's claim deficient on those grounds (766 F.2d at 1050 & n.16).

[4] Respondent's reliance (Br. in Opp. 11) on *Elbert* v. *Johnson,* 164 F.2d 421 (2d Cir. 1947), is misplaced. In that case, the taxpayers had sought to recover a prior gift tax payment by invoking equitable recoupment in a Tax Court proceeding concerning income tax liability arising out of the same transaction. The Tax Court determined that it lacked jurisdiction to award recoupment. See Pet. 17-18 & n.10; *Commissioner* v. *Gooch Milling & Elevator Co.,* 320 U.S. 418 (1943). The taxpayers then sought to raise the recoupment claim by filing an income tax refund action, and the court of appeals held the action barred by Section 322(c) of the 1939 Code, which embodied the general rule prohibiting a refund action with respect to a tax that was the subject of a prior Tax Court proceeding. See 26 U.S.C. 6512(a). In its opinion, the court noted that it assumed that the taxpayers could have raised an equitable recoupment claim in a timely-filed suit for refund of the income tax liability (if they had not first resorted to the Tax Court). Thus, the holding and opinion in *Elbert* are both fully

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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consistent with *Bull*. The passage quoted by respondent is taken from a separate opinion concurring in the result, which also agreed that the taxpayers could not maintain their independent action for equitable recoupment. The particular passage emphasized by respondent is thus dictum even within the context of the concurring opinion; moreover, it is incorrect. There is no support for the proposition that the statute of limitations is "tolled" while a taxpayer litigates his version of a transaction to a final resolution. To the contrary, this Court stated in *Bull* that inconsistent treatment of a particular transaction "cannot avail to toll the statute of limitations" (295 U.S. at 259).

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